LIBRARY
SUPREME COURT, U. S

IN THE

Supreme Court of the United States

October Term, 1970.

No.

LEWES DAIRY, INC., and CLIFFORD S. OTT, et al.,
d/b/a HOLLYBROOK DAIRY,

Petitioners,

v.

CLIFFORD M. HARDIN, Secretary of Agriculture,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

JAMES M. TUNNELL, JR.,
ANDREW B. KIRKPATRICK, JR.,
MORRIS, NICHOLS, ARSHT & TUNNELL,
3000 duPont Building,
Wilmington, Delaware,
Attorneys for Petitioners.

International, 711 So. 50th St., Phila., Pa. 19143—Tel. SA 7-8711 Area Code 215

TABLE OF CONTENTS.

	Page
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Constitutional and Statutory Provisions Involved	3
Statement of the Case	4
The Reasons for Granting the Writ	9
Conclusion	12
Appendix:	
Court of Appeals Opinion	A1
Court of Appeals Judgment	A24
District Court Opinion	A25
District Court Order	A33
Petition for a Writ of Mandamus	A35
Court of Appeals Order	A38
Answer to Petition for Mandamus	A40
Court of Appeals Order	A44

TABLE OF CITATIONS.

Cases: Page

duPont v. United States, 385 F. 2d 78 (3d Cir. 1967) 11

Lehigh Valley Cooperative Farmers, Inc. v. United States, 370 U. S. 76 (1962) 4, 6

Lewes Dairy, Inc., In Re, 25 Agric. Dec. 709 (1966) 5

Lewes Dairy, Inc. v. Freeman, 260 F. Supp. 921 (1966) 6

Lewes Dairy, Inc. v. Freeman, 401 F. 2d 308 (3d Cir. 1968) .. 6

United States v. Lewes Dairy, Inc., 337 F. 2d 827 (3d Cir. 1964) 4

Statutes and Regulations:

Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, 7 U. S. C. § 608c:

§ 608c(5)(C) 5

§ 608c(15)(A) 3, 4, 10

§ 608c(15)(B) 4

Federal Rules of Civil Procedure, Rule 60(b) 10

U. S. Const. amend. XIV 3

28 U. S. C. § 1254(1) 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

No.

LEWES DAIRY, INC., AND CLIFFORD S. OTT, ET AL., d/b/a HOLLYBROOK DAIRY,

Petitioners,

v.

CLIFFORD M. HARDIN, SECRETARY OF AGRICULTURE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Petitioners ask that a writ of certiorari issue to review the final order of the United States Court of Appeals for the Third Circuit in its case No. 18,858, in which that Court determined to grant a petition of the Secretary of Agriculture for a writ of mandamus directed to Honorable Caleb R. Layton, 3rd, United States District Judge for the District of Delaware, the nominal respondent in that case.

OPINIONS BELOW.

The only opinion of the Court of Appeals in case No. 18,858 is expressed in the final order, which is dated July 1, 1970, is not reported, but is printed in the appendix hereto (Appendix A44). The opinion of the United States District Court for the District of Delaware dated February 5, 1970, to which the final order of the Court of Appeals directed its writ of mandamus, is not reported but is contained in the appendix (Appendix A25).

Opinions rendered in prior, related proceedings are reported as follows—337 F. 2d 827 (3d Cir. 1964); 379 U. S. 1000 (1965); 25 Agric. Dec. 709 (1966); 260 F. Supp. 924 (Del. 1966); 401 F. 2d 308 (3d Cir. 1968) (Appendix A4); and, 394 U. S. 929 (1969).

JURISDICTION.

The final order of the Court of Appeals sought to be reviewed was dated and entered July 1, 1970 (Appendix A47). A timely petition filed by these petitioners for rehearing on the Court of Appeals' final order was denied on July 27, 1970. The jurisdiction of this Court to review by writ of certiorari the final order of the Court of Appeals is conferred by 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

Whether the Constitution, the Agricultural Marketing Agreement Act of 1937, and the standards of practice applying to the Federal Courts of Appeals permit such a Court to order the exaction of regulatory charges under a Federal Milk Order and to deny to the affected dairies any hear-

ing to assert the unlawfulness of those charges, which are in fact questioned on grounds of importance to the milk industry nationally and as to which the court below had ordered a hearing?

Whether the Constitution, the Act, and those standards of practice permit a Court of Appeals to order the execution of other, earlier charges under a Federal Milk Order and to deny to the affected dairies a further hearing when—in the hearing that had been held with respect to those charges the evidence of the dairies was admitted and not contradicted; the subsequent ruling adverse to the dairies was based upon a post-hearing rejection of their evidence; and the denial of a further hearing in such circumstances conflicted with the rule of the same Court of Appeals which is applied in other cases and which in this instance had been followed by the court below in ordering a further hearing?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

The Constitutional provision which the case involves is the Due Process Clause of the Fourteenth Amendment, and the statute involved is § 608c(15)(A) of the Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, 7 U. S. C. § 608c, which provides in part:

> "Any handler [dairy] subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempt therefrom. He shall thereupon be given an opportunity for a hearing upon such petition, . . ."

STATEMENT OF THE CASE.

The order of the Court of Appeals here in issue exacts moneys from the petitioning dairies in satisfaction of a Federal Milk Order's regulatory charges on the dairies' purchases of milk and, among other things, denies to those dairies any opportunity for a hearing to show that the major portion of the exactions are unlawful. A deprivation of primary due process is therefore involved.

As to the background, when the Milk Order became effective in 1960, the dairies attacked its validity under the controlling statute, the Agricultural Marketing Agreement Act of 1937 (7 U. S. C. § 608(c)), in proceedings instituted before the Secretary of Agriculture under § 608c(15)(A) of that Act. Since that time, and up through the present, the dairies have paid and are presently paying the Order's monthly regulatory charges into the registry of the District Court, over protest.[1]

As a result of the first round of appeals from the initial administrative proceedings, prosecuted pursuant to § 608c(15)(B), the case was remanded to the Secretary of Agriculture, at his urging, for the submission of further evidence and for further administrative consideration in the light of the decision of this Court in *Lehigh Valley Cooperative Farmers, Inc. v. United States*, 370 U. S. 76 (1962), which had intervened after the time of the administrative hearing (*United States v. Lewes Dairy, Inc.*, 337 F. 2d 827 (3d Cir. 1964)). In *Lehigh*, this Court had held,

1. This is an overgeneralization to the extent that one of the dairies, Hollybrook, which a very minor part of the total moneys involved, went out of business after the Order was applied to it, and approximately half of its charges, if due, are still to be collected from the former partners. Presently there is approximately $450,000 on deposit in the registry of the District Court; approximately $425,000 of this involves exactions of Lewes, the other dairy, and $25,000 exactions of Hollybrook.

in the first judicial pronouncement to that effect, that § 8c(5)(G) of the Act prohibited the Secretary of Agriculture from creating, through such regional milk marketing orders, "any kind of economic trade barriers" to the inter-market movement of milk (370 U. S. at p. 97).

At the remanded hearing before the Secretary, in pinpointing their attack on the trade barrier ground announced in *Lehigh*, the dairies indisputably established that they buy and process their milk in lower Delaware, which is an unregulated area, and sell most of it in that area, selling the balance of their production in the State of Maryland, and yet that, because the balance shipped by them into the State of Maryland constitutes more than 10% of their production, they are regulated by the Milk Order which applies to the State of Maryland and are thereby required to pay into the Maryland Order's fund a regulatory charge on all the milk they purchase, rather than on only that milk which is sold in Maryland. The dairies also submitted expert opinion evidence, which was admitted over objection and never contradicted, as to the fact that, up through the time of that hearing, they purchased their milk in competition with other Delaware dairies, paying competitive prices, and sold in Delaware in competition with those dairies, which make no shipments at all into Maryland and are therefore not subject to the Milk Order and its regulatory charges on their purchases. On the merits the dairies argued that, since they and their Delaware competition purchased and sold competitively, they were subjected to an economic trade barrier, when, unlike their competition, they were also required to pay a regulatory exaction on their Delaware business because of the business they also did shipping into Maryland.

Following that remanded hearing, which closed July 13, 1965, the Secretary ruled against the dairies (25 Agric. Dec.

709 (1966)). On appeal the District Court reversed (260 F. Supp. 921 (1966)). On the Secretary's appeal to the Court of Appeals it reversed the District Court (401 F. 2d 308 (3d Cir. 1968), Appendix A1).

The Court of Appeals based this, its second decision in the case, upon a ruling that there had been a failure of proof in the dairies' use of their generalized, opinion evidence concerning the buying-market conditions explaining, in what was the first judicial pronouncement to its effect, that evidence of the specific prices paid by the dairies and offered by their Delaware competition for the particular purchases that generated the regulatory charges was indispensable in showing that the charges had the invalid trade barrier effect asserted by the dairies (401 F. 2d at pp. 314, 316, 317, Appendix A11, A14, A16). The closing paragraph of the opinion stated (401 F. 2d at p. 320; Appendix A23):

> "The foregoing discussion leads to the conclusion that Lewes has fundamentally failed to prove that its competition in the unregulated market enjoyed an advantage over it which creates an economic trade barrier contemplated by section 8c(5)(G) as treated by the Supreme Court in *Lehigh Valley Cooperative Farmers, Inc. v. United States*, and we find valid the action of the Secretary in imposing full regulation upon Lewes under Marketing Order No. 16. . . ."

Upon remand to the District Court the dairies applied to that Court for a further remand of the case to the Secretary of Agriculture in order to provide them with an opportunity to be heard in the light of the second Court of Appeals' decision, in the way the Secretary had succeeded in the first Court of Appeals' decision in obtaining a further hearing in the light of *Lehigh*. The dairies pointed out that, with respect to their purchasing transactions

which took place prior to the last hearing; their counsel's failure to anticipate the necessity for the specific form of proof subsequently held by the Court of Appeals to be essential was excusable, particularly when the evidence on the point which they offered at the hearing had then been held admissible. The dairies also pointed out that they had obviously never had any hearing opportunity with respect to the substantial transactions which had transpired subsequent to the last administrative hearing, since the Court of Appeals' decision held evidence of the particulars of the transactions to be critical and those transactions were in futuro at the time of that hearing.

The District Court, in what it thought was a permitted exercise of its power, granted the dairies' application (Appendix A28, A33). The Secretary thereupon filed with the Court of Appeals the petition for a writ of mandamus that culminated, after expedited proceedings, in the order here in issue (Appendix A35, A38).

The Secretary grounded his petition upon the assertion that the mandate of the Court of Appeals which issued following the last appeal had deprived the District Court of power to order the remand to the Secretary.[2] In response the dairies urged that the subject of a further remand to the Secretary was hardly timely until the decision in the prior appellate proceedings, was never mentioned in those proceedings, and was not touched upon in the mandate. The Court of Appeals, without opinion and by the order here in issue, nevertheless determined to issue the writ of mandamus (Appendix A44).

In its order the Court of Appeals expressly calls for the immediate release to the Maryland fund of all of the

2. Before the District Court the Secretary had never mentioned the mandate of the Court of Appeals and had presented his arguments as though the question of a remand for further hearing was one within the District Court's discretion.

regulatory charges which have been paid into the registry of the District Court, including those currently being paid,[3] and denies any further hearing with respect to any of those charges (Appendix A46-47). Therefore, the order not only denies the dairies any opportunity to meet the standard of proof which the Court of Appeals announced only after the last administrative hearing, but denies the dairies from ever having any hearing at all with respect to the legality of the regulatory charges that have been generated by operations since the last hearing.

---

3. Actually, the charges are on deposit in separate enforcement cases the records of which were not before the Court of Appeals and in which there were pending in the District Court motions of the Secretary supported by various detailed computations as to the precise amounts claimed to be due the Maryland fund and its various accounts.

THE REASONS FOR GRANTING THE WRIT.

The trade barrier question in the merits of this litigation is a question of substantive federal law whose resolution is important to the milk industry nationally; the Secretary of Agriculture has said that it is "a question of great public interest"[4] which should not be decided in an "interlocutory posture."[5] The order of the Court of Appeals here in issue finally forecloses any opportunity to reach those merits and does so in a manner which is violative of procedural fundamentals governing the federal courts and which is inconsistent with the rules applied by that same Court in other cases.

With respect to the major portion of the regulatory charges which are those that arose from milk transactions subsequent to the last administrative hearing—The Court of Appeals held on the last appeal that the substantive trade barrier point asserted by the dairies must turn exclusively upon evidence of the specific prices involved in the individual transactions giving rise to the regulatory charges that are claimed to have trade barrier effect.

The instant order of that Court directs disposition of all moneys on deposit in the registry of the District Court, including the regulatory charges arising from transactions that have taken place since the last administrative hearing (being the major portion of the moneys on deposit), even though the dairies have had no hearing at all with respect to these later charges. At the time of the last hearing the transactions giving rise to these charges had not yet taken place; and therefore, at that hearing the dairies could not

4. Secretary's Opposition to Lewes Dairy's motion to dismiss in the first appeal herein to the Court of Appeals, No. 14,043, p. 2.

5. Secretary's brief in opposition to petition for certiorari in No. 717, United States Supreme Court, October Term 1964, pp. 8-9.

possibly have provided the specific evidence concerning these transactions which the Court has held to be critical. The instant order of the Court of Appeals also denies the dairies any future opportunity for a hearing with respect to these charges.

Hence, the dairies have never heretofore had a hearing at which they could attack the lawfulness of the major portion of the charges upon them which are here disposed of, and they are now denied any future opportunity for such a hearing. The governing statute expressly provides that dairies "shall . . . be given an opportunity for a hearing" to assert that "any obligation imposed in connection [with a Milk Order] is not in accordance with law" (7 U. S. C. § 608c(15)(A)). Of course, due process requires this as well. The departure from these requirements is therefore plain and extreme.

With respect to the charges on earlier transactions.—Since these transactions had taken place by the time of the last administrative proceedings, the dairies did, in a sense, have a hearing with respect to them, and with sufficient foresight they could then have offered their proof in the form later decided by the Court of Appeals to be essential.

The fact that a hearing has been held, however, hardly requires or even justifies denying an opportunity for a further hearing in circumstances such as these. The evidence which the dairies submitted at the hearing they had was conventional, and nothing in the books suggested that there was a requirement of the specific form of proof subsequently held by the Court of Appeals to be required. Furthermore, in the hearing the evidence offered by the dairies was admitted over objection as probative and never thereafter contradicted.

Even after the entry of judgment, Rule 60(b) of the Rules of Civil Procedure would in the ordinary case au-

thorize a further hearing in the circumstances here present, since counsel's failure to anticipate the post-hearing rejection of evidence admitted at the hearing, at least in an uncertain field of law, must constitute excusable neglect. In fact, the determination to foreclose an opportunity for a further hearing by the panel of the Court of Appeals involved in this case (Judges Kalodner, Staley, and Forman) is diametrically opposed to the procedural rule applied by a different panel of that Court (Judges Hastie, Freedman, and Seitz) in another case, *duPont v. United States*, 385 F. 2d 780 (3d Cir. 1967). In that case a court of the same District here involved had admitted evidence on a critical point and after hearing rejected the evidence as legally irrelevant. On appeal of the trial court's denial of a rehearing, the Court of Appeals in *duPont* held that the trial court's refusal of a further hearing in such circumstances constituted reversible abuse of discretion, noting (385 F. 2d. at p. 784)—

> "It is always desirable that a litigant's claim should be determined after presentation of all the relevant evidence . . . [that there should be] an opportunity to supply the vacuum created by the post-trial determination of the legal insufficiency . . . in evidence . . ."

In the order here in issue the Court of Appeals makes no mention of these considerations and rules only that, "notwithstanding arguments advanced on behalf of" the dairies (Appendix A46), the mandate of the appellate court on the last appeal deprived the District Court of power thereafter to weigh such considerations and to direct a further remand to the Secretary. This it does notwithstanding the facts that—the subject of a further remand was never mentioned in the prior appeal or in the appellate court's mandate; the terms of the appellate court's judg-

ment simply reversed a summary judgment that had been entered on the merits below, and the appellate court's opinion dealt only with the evidentiary questions; and the moneys on deposit in the District Court registry had been paid and accumulated in separate, enforcement cases which were not on the appeal, and their disposition was appropriate for consideration only in the lower court upon the remand of and in the light of the decided appellate case. To say that consideration of the serious federal questions presented by the application for a further remand was foreclosed by what had happened in the prior appeal is not only to decline an adjudication of the questions but to do so on a ground that is itself procedurally questionable.

CONCLUSION.

This case represents a genuine, ten-year effort of private parties to obtain an adjudication on its merits of a nationally important substantive question of federal regulatory law which, but for the intervention of this Court, will now have been altogether frustrated by federal appellate court practices that must violate due process as well as the general procedural standards expected of the federal courts. A writ of certiorari is needed, not only to forestall this imminent denial of justice, but to announce the right rules of law in this troubled field.

Respectfully submitted,

JAMES M. TUNNELL, JR.,
ANDREW B. KIRKPATRICK, JR.,
MORRIS, NICHOLS, ARSHT &
TUNNELL,
3000 duPont Building,
Wilmington, Delaware,
Attorneys for Petitioners.

Appendix.

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 16528

LEWES DAIRY, INC., AND CLIFFORD S. OTT, ET AL.,
d/b/a HOLLYBROOK DAIRY

v.

ORVILLE L. FREEMAN, SECRETARY OF AGRICULTURE,
Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF DELAWARE

Argued November 7, 1967

Before STALEY, *Chief Judge*, KALODNER and
FORMAN, *Circuit Judges*.

OPINION OF THE COURT

(Filed September 25, 1968)

By FORMAN, *Circuit Judge*.

This is the second time the Secretary of Agriculture appeals from an order of the United States District Court for the District of Delaware which held invalid certain minimum pricing provisions of Milk Marketing Order No. 16[1] on the ground that, as applied to Lewes Dairy, Inc.,[2] they created a prohibited "trade barrier". The Order in question, promulgated by the Secretary pursuant to authority granted him by the Agricultural Marketing Agreement Act of 1937, as amended, 7 U. S. C. § 608c, regulates the milk industry in the Upper Chesapeake Bay, Maryland marketing area.

In an earlier proceeding, following Department of Agriculture administrative hearings,[3] the District Court

1. Originally, this Order, which became fully effective February 1, 1960, was denominated No. 127; it has since been renumbered as No. 16. See 7 C. F. R. Part 1016. Hereinafter, Order No. 16 will be referred to without number.

2. Technically this appeal involves appellees, Lewes Dairy, Inc., and Clifford S. Ott and James M. Faulkner, doing business as Hollybrook Dairy, a partnership. During the course of this litigation, Hollybrook Dairy was sold and is no longer doing business. Its interest in the proceeding, which relates to certain back payments, has been represented by Lewes Dairy. For convenience the appellees will be referred to hereinafter as Lewes.

3. Shortly after the Order became effective, its validity was challenged by Lewes and several Maryland milk companies in administrative proceedings. From the ruling therein that the Secretary had lawfully exercised his authority, judicial relief was sought by both the Maryland companies and Lewes in the respective United States District Courts of Maryland and Delaware. *In re Mills Dairy Products Co.*, 20 A. D. 541 (1961). In the Maryland cases, the Court of Appeals for the Fourth Circuit upheld the Order on issues unrelated to those advanced herein by Lewes, reversing the contrary ruling of the District Court of Maryland. *United States v. Mills*, 315 F. 2d 828 (4 Cir. 1963), *reversing* 206 F. Supp. 239 (D. Md. 1962), *cert. denied, sub nom., Willow Farms Dairy, Inc. v. Freeman*, 374 U. S. 832 (1963).

held that the Milk Marketing Order in question was invalid as applied to Lewes in that it violated 7 U. S. C. § 608c(5)(G), as construed in *Lehigh Valley Cooperative Farmers, Inc. v. United States*.[4]

On appeal this court reversed the ruling of the District Court and held that the case should be remanded to the Department of Agriculture to give it an opportunity properly to exercise its statutory powers, because the trade barrier issue had not been raised or considered in the administrative proceedings which were held approximately one year prior to the decision in *Lehigh Valley*.[5]

The Judicial Officer, acting for the Secretary, held further hearings on the remand and, in a formal decision, rejected the challenge to the Marketing Order as both unsupported by the record and incorrect in law.[6] Judicial review of this ruling was sought by Lewes, and again the District Court held the Order invalid as creating a trade barrier.[7] On this appeal the Secretary, for the second time, contends that the District Court erred in concluding that the Marketing Order, as applied to Lewes, created a trade barrier.

The operation of the Milk Marketing Order and the facts of this case will be briefly summarized since they are at this point "beyond dispute". Under the Order, milk is classified according to the use made of it by milk companies, or "handlers". Thus, milk used in fluid form is Class I, and milk used to manufacture products such as

4. 370 U. S. 76 (1962).

5. *United States v. Lewes Dairy, Inc.*, 337 F. 2d 827 (3 Cir. 1964), *cert. denied*, 379 U. S. 1000 (1965).

6. *In re Lewes Dairy, Inc.*, 25 A. D. 709 (1966).

7. *Lewes Dairy, Inc. v. Freeman*, 260 F. Supp. 921 (D. Del. 1966).

butter and cheese is Class II. The Order establishes a minimum price for each class of milk—the Class I fluid price being higher than the Class II price.

These established prices reflect those which would usually be paid for milk depending on use value. Because of the price differential in an unregulated market, where the supply of fluid milk is greater than the demands of the fluid milk market, chaotic conditions often resulted among producers each seeking to benefit from the greater use value, and therefore the higher price paid for milk used in fluid form. One of the major purposes of the Agricultural Marketing Agreement Act was to create and maintain an orderly market and, in so doing, assure the dairy farmer an adequate minimum price for the milk he delivered to the handlers regardless of how the milk was later used. To avoid the often destructive competition of the unregulated market, a method was devised whereby handlers are required to pay at least a uniform "blend" price to the producers regardless of the use to which it has been put. To arrive at this blend price, all handlers who receive or distribute milk within the marketing area are required to submit monthly reports to the Market Administrator, listing the quantity of milk they have handled and the use for which it was sold. These reports are tabulated and each month a blend price is established which represents the average of the class prices weighted by the amount of producer milk actually used in each class by all of the handlers regulated under the Order.

In promulgating a marketing order the Secretary must consider the supply of milk upon which the market, in this instance, Upper Chesapeake Bay, Maryland, regularly and normally depends. This milk, comprising the "market-wide pool" the Secretary found consisted of that received by plants regularly serving the market area with fluid

milk. The regulatory scheme was designed to affect those plants of handlers which have substantial business in the market area. These plants, called "pool plants", are those which utilize at least 50 percent of the milk received from farmer producers as fluid milk and distribute at least 10 percent of those receipts in the form of fluid milk in the marketing area. The Marketing Order places pool plants under "full regulation". This means that the milk company or handler which operates a pool plant must pay producers at least the uniform blend price on all milk received from them irrespective of the uses made of the milk by the handler or the places where it is later distributed.

While requiring that the blend price be paid to producers, the Act also recognizes that regulated handlers may make different uses of the fluid milk which they purchase. To make adjustments among the handlers and thereby reflect the class use value of the milk to the handler, a producer settlement fund is established by the Order. Each regulated handler pays into, or draws from this fund the difference between the amount paid to its producers under the uniform blend price and the use value of its milk computed at the established class prices. A handler who distributes most of his milk as Class I fluid milk has a greater use value for the milk than the blend price which he paid for it. He would contribute the difference between the blend price and the class utilization price into the fund. A handler who paid the blend price but used the milk to manufacture products would draw from the fund the difference between the blend price he paid and the lower class utilization price. In this way, each handler ultimately pays a price for the milk he purchases which reflects the use he makes of it. The net result of this regulation is that handlers pay for the milk accord-

ing to its use value to them while the producer farmers are protected from the perilous competition for the fluid milk market by the automatic allocation to them of the blend price which apportions the profitable fluid milk market and the burdensome surplus market among all the producers that serve the marketing area.

Lewes operates one milk processing plant, located in Sussex County, Delaware, from which it distributes fluid milk to retail outlets in the area of Maryland regulated by the Marketing Order in question, and various parts of Delaware which are unregulated by any Marketing Order. The regular source of supply of the milk which Lewes processes and sells is from nine or ten producers, all from Kent and Sussex Counties, Delaware. An additional supply of milk, ranging from 18 to 33 percent of its total annual receipts, is obtained from another handler located in Pennsylvania when it is needed by Lewes to balance or supplement its requirements.

The Secretary found that Lewes utilized substantially all of its milk in Class I form and that annually it distributed in the regulated area between 40 and 61 percent of its receipts from farmer producers. Lewes admits that this finding is accurate but argues that when its receipts from all sources are considered it ships on an annual basis, between 35 and 45 percent of its total production into the regulated marketing area and sells the remaining 55 to 65 percent in Delaware. Regardless of which figure is used, the Order imposes full regulation on Lewes since it distributes more than 10 percent of its production in the regulated area.

Prior to the effective date of the Order, Lewes paid its producers at the competitive Delaware price which was higher than the uniform blend prices subsequently estab-

lished under the Order.[8] Because the Order imposes full regulation on it, Lewes contends that its principal competitors, who are unregulated Delaware dairies, enjoy a price advantage. Full regulation requires Lewes, a fluid milk handler, to pay into the producer-settlement fund the blend price—Class I differential on all the milk it processes even though the greater portion of it is distributed in the Delaware market. Thus, it contends, the total cost of the milk it purchases (the price it pays to its producers plus the amount it pays into the fund) is greater than the cost which its unregulated Delaware competitors must pay. Also, Lewes contends that the Delaware producers to whom it pays the blend price will not sell to it at that rate after this litigation, if Lewes is unsuccessful, because they can get a higher price for their milk from the unregulated Delaware handlers.

Lewes concedes that as to the milk it distributes in the regulated marketing area it should meet the obligations imposed on it by the Marketing Order and pay the blend price—Class I differential into the producer-settlement fund. But Lewes insists that full regulation, which exacts from it this differential on all milk, including that which never enters the regulated marketing area, in effect, creates an economic trade barrier on its shipments of milk into Maryland in violation of section 8c(5)(G) of the Agricultural

---

8. For some time after February 1, 1960 when the Order became effective, Lewes continued to pay its producers the higher Delaware market price subject to an agreement by the producers to refund to Lewes all amounts in excess of the blend prices if Lewes should be unsuccessful in this litigation. Since February 1963, however, Lewes has paid its producers only the minimum blend price required by the Order. Pursuant to an order of the District Court, all payments due from appellees to the producer-settlement fund have been paid each month into the court's registry pending the outcome of this litigation. As of June 1, 1967, Lewes Dairy has deposited $261,503.66; Hollybrook Dairy has paid $18,236.63 and is charged with owing an additional $45,574.85.

"Marketing Agreement Act" as construed by the Supreme Court in *Lehigh Valley*.

The District Court accepted the argument of Lewes that *Lehigh Valley* controls the decision in this case. It construed that decision as meaning that full regulation of Lewes constituted an economic trade barrier in violation of section 8c(5)(G) of the Act.

Lehigh Valley involved the legality of a "compensatory payment" provision of the New York-New Jersey Milk Marketing Order. Such compensatory payments were assessed against "outside" milk companies, which, because of their limited sales in the marketing area, were not fully regulated and were therefore free to purchase their milk at less than the minimum class prices or blend price. Because the outside handlers could disrupt the regulatory scheme of the Marketing Order by introducing underpriced milk into the market, the Order required them to pay into the producer-settlement fund on all the fluid milk they sold in the market area the difference between the highest fluid and lowest surplus class prices established by the Order. The essence of the plan, as the Supreme Court noted, was the imposition of "special monetary exactions on handlers introducing 'outside' milk for fluid consumption into a marketing area in months when there is a substantial surplus of milk on the market." [10]

The Court held the plan to be an invalid attempt to effect competitive parity among non-pool and pool handlers and to correct the disruptive impact on the total regulatory

---

9. 7 U. S. C. § 608c(5)(G):

"No marketing agreement or order applicable to milk and its products in any marketing area shall prohibit or in any manner limit, in the case of the products of milk, the marketing in that area of any milk or product thereof produced in any production area in the United States."

10. 370 U. S. at 82.

scheme caused by the importation of unregulated outside fluid milk. Since the compensatory payment bore no relation to the actual cost of the milk, the effect of the plan, under the particular facts of that case, was to make outside or non-pool milk more expensive and thereby protect local producers and pool handlers in the marketing area from competition with outside fluid milk. The compensatory payment plan in *Lehigh Valley* constituted an economic trade barrier in violation of section 8c(5)(G) because it prevented outside handlers from competing in the marketing area on equal terms with others doing business therein. The legislative history of section 8c(5)(G) was fully examined by the Court, and it concluded that the intent of that section was to asssure that milk and milk products brought into a marketing area from outside the area would not be subject to greater restrictions or limitations than would be applied to milk and milk products within the area.

In the instant case, Lewes is not an outside dealer. It is a fully-regulated handler associated with the marketing area by virtue of its substantial distribution in the area. The regulations to which it is subject are identical with those imposed upon every other regulated handler doing substantial business in the area. Lewes does not contend that it cannot compete on equal terms within the market area. Its contention that the Order erects a trade barrier is based on the argument that, because of the payments it is required to make into the producer-settlement fund on the milk which it distributes in Delaware outside the regulated market area, Lewes finds itself at a disadvantage with respect to the unregulated handlers with whom it competes in Delaware. The effect, it submits, is to discourage it from doing business in the regulated Maryland area.

In *Lehigh Valley* the Court did not consider the difficulties encountered by a regulated handler doing business

in an unregulated area. In fact the Court expressly declined to consider whether section 8c(5)(G) prohibits full regulation. It stated:

> "Whether full regulation of the petitioners would be permissible under the Act is a question which we need not reach in this case. If the Secretary chooses to impose such regulation as a consequence of a handler's introducing any milk into a marketing area, the validity of such a provision would involve considerations different from those now before us." [11]

The Supreme Court, in *Lehigh Valley* overturned a system of "compensatory payments" because, as it said therein, "with respect to these petitioners" the payments demanded effected a trade barrier to the introduction into the market area of "outside" milk. The Court did not strike down all compensatory payments, rather it found that the particular rate of payment involved therein was invalid.[12]

In *Sterling Davis Dairy v. Freeman*,[13] the plaintiffs therein relied on the rule of *Lehigh Valley* in their effort to show the discriminatory and illegal effect of the regulation which they challenged. The court, however, rejected their application of *Lehigh Valley* because they had not demonstrated the discriminatory effect of the challenged regulation as had been done in *Lehigh Valley*. It stated:

"It is to be noted that the crux of the *Lehigh* ruling rests in the actual discriminatory nature of

---

11. 370 U. S. at 99.

12. The Supreme Court intimated in *Lehigh Valley* that a marketing order which invoked a rate of contemporary payments which merely placed non pool (unregulated) handlers on a par with pool (regulated) handlers would not be a trade barrier. See 370 U. S. at 98 and 87, n.13.

13. 253 F. Supp. 80 (D. N. J. 1965).

the *rates* demanded of non-pool handlers introducing 'outside' area milk." [14]

The petitioners in *Lehigh Valley* introduced specific rates and prices to support their contention that the Order, as applied to them, was discriminatory. As an example, they showed that the regulation required one of the petitioning handlers to pay $9.18 per hundredweight for the milk introduced into the marketing area, while the pool plant handlers were paying only $6.23 per hundredweight for distributing the same type of milk in the market.[15]

It was for the very purpose of affording Lewes an opportunity to adduce evidence to demonstrate the trade barrier effect of the Marketing Order that this court remanded the matter for further administrative procedure. At the administrative hearing on remand, Lewes offered only one witness, its treasurer. He testified that there are between 500 and 600 farmer producers in the area of Delaware where Lewes buys its milk and all but 100 sell their milk to handlers who are regulated by other federal milk marketing orders. He named several local unregulated Delaware handlers with whom Lewes competes in buying milk from producers and in selling it as bottled milk. Although the witness asserted that the prices paid by competitors were lower than those which the Order forced Lewes to pay, he failed to testify as to prices paid by other milk companies and no other evidence was offered by Lewes on this crucial point. In this situation, it cannot be said that the proof offered by Lewes demonstrated the specific discriminatory effect of the challenged regulation as was disclosed in *Lehigh Valley*.

---

14. *Id.* at 86.

15. 370 U. S. at 86.

The Secretary relied on the decision of this court in *Titusville Dairy Products v. Brannan*[16] to support the proposition that a milk marketing order may subject a handler who does only part of his business in the marketing area to the pricing requirements of the order on all of his producer milk purchases, including those not intended for distribution in the marketing area. In that case, this court ruled that a Pennsylvania milk company was a fully regulated handler under the order regulating the handling of milk in the New York metropolitan marketing area because it had a permit from the New York City Health Department to sell milk there as required by the marketing order. Hence it was subject to the minimum pricing provision of that order on all of its producer milk receipts even though during part of the period in question it distributed no milk in the marketing area. Lewes contends, and the District Court held, that the Supreme Court in *Lehigh Valley*, overruled *sub silentio Titusville* to the extent that it approved full regulation of a handler introducing only a portion of its production into the marketing area. It is true, as the District Court noted, that in *Titusville* the effect of section 8c(5)(G) on full regulation was not discussed. For that reason *Titusville* does not furnish the support claimed by the Secretary. However, in light of the Supreme Court's declination to consider whether full regulation is permissible under the Act, it cannot be said that *Lehigh Valley* overruled *sub silentio Titusville*.

As the Supreme Court demonstrated in *Lehigh Valley*, section 8c(5)(G) evolved out of the Congressional intent to restrain the Secretary from imposing regulations which would burden the free flow of milk and its products in commerce. It was designed to insure that no regulation would be promulgated placing a greater burden on outside

16. 176 F. 2d 332 (3 Cir.), *cert. denied*, 338 U. S. 905 (1949).

milk and milk products entering the market than was placed on milk and its products within the market. Thus the Secretary in his efforts to protect a particular market may require no more than equal treatment of pool and non-pool milk. Full regulation is not an attempt to keep milk out of the market or a means of placing a greater burden on outside milk entering the market. In fact, it is a means of insuring equality among all handlers operating pool plants which regularly and normally supply the market with fluid milk purchased from producers. Unlike the particular compensatory payment which was involved in *Lehigh Valley*, full regulation in this case can not be characterized as an attempt to protect those doing business in the market, at the expense of those outsiders seeking to enter the market. Therefore, there is nothing in *Lehigh Valley* which inherently invalidates full regulation. Hence, we cannot agree with the District Court's analysis of *Lehigh Valley* that full regulation, as applied to Lewes is, "Surely, . . . the kind of 'economic trade barrier' sought to be prohibited by § (5)(G), as construed in *Lehigh Valley*."[17]

Moreover, we are persuaded, for other reasons, that the District Court was not justified in overturning the Secretary's decision. The power of the District Court in reviewing the decision of the Secretary, following his adjudicatory hearing,[18] is not a *de novo* fact finding process.

17. 260 F. Supp. at 927.

18. 7 U. S. C. § 608c(15)(A) provides:

"Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is *not in accordance with law* and praying for a modification thereof or to be exempted therefrom. He shall thereupon be given an opportunity for a hearing upon such petition, in accordance with regulations made by the Secretary of Agriculture, with the approval of the President. After such hearing, the Secretary shall make a ruling upon the prayer of such petition which shall be final, if in accordance with law." (Emphasis added.)

It is limited to a determination whether the rulings of the Secretary are in accordance with law and his findings are supported by substantial evidence.[19] If they are, they may not be disturbed. Because there attaches to the determination of an administrative agency a presumption of the existence of facts justifying the determination, the burden of proof falls on the party challenging the validity of the agency's ruling.[20] Applying these standards to the present appeal, it was incumbent on Lewes to demonstrate at the administrative hearing the existence of the alleged trade barrier by showing that it paid more for its milk than its unregulated Delaware competitors. Unless these competitors do in fact enjoy a price advantage, it cannot be said that Lewes suffers an economic burden caused by the Order. The only evidence Lewes offered on the point was the testimony of its treasurer which has been heretofore recounted. It fell far short of the required specific showing.

On the other hand the Department of Agriculture went forward by offering evidence compiled from records submitted by Lewes itself which indicated that Lewes's milk business had grown steadily and in fact increased substantially since the inception of the contested Order.[21] This evidence disclosed that Lewes's Class I sales of fluid milk in Delaware, outside the marketing area, increased from approximately 30 million pounds in 1960 to approxi-

19. 5 U. S. C. § 706. *United States v. Mills*, 315 F. 2d 828 (4 Cir. 1963); *Wazea Dairy Farms, Inc. v. Wickard*, 149 F. 2d 860 (3 Cir. 1945); *Greensboro Farm Products, Inc. v. Wickard*, 137 F. 2d 969 (2 Cir. 1943).

20. *Windham Creamery, Inc. v. Freeman*, 230 F. Supp. 632 (D. N. J. 1964); *aff'd.* 350 F. 2d 978 (3 Cir. 1965), *cert. denied*, 382 U. S. 979 (1966); *Sterling Davis Dairy v. Freeman*, 253 F. Supp. 80 (D. N. J. 1965).

21. The documentary evidence was compiled for the five years from 1960 to and including 1964, the last year for which complete figures were available at the time of the administrative hearing.

nately 3.4, 3.8, 3.8 and 4.6 million pounds in 1961, 1962, 1963 and 1964 respectively. At the same time that Lewes increased by more than 50 percent its milk distribution in Delaware, the area where it allegedly experiences the competitive disadvantages, it also managed to increase slightly its sales volume within the regulated marketing area. The figures concerning Lewes purchases from farmer producers also indicate that it has substantially increased such receipts from a total of approximately 3.6 million pounds in 1960 to a total of approximately 4.17, 4.49, 4.96 and 4.93 million pounds in 1961, 1962, 1963, and 1964 respectively.[22] The Secreary noted that these figures do not picture a regulated handler who cannot compete in the sale of fluid milk in an unregulated area, or a regulated handler who cannot compete in the procurement of milk with unregulated dealers.

The District Court, however, found vulnerable the evidence of Lewes's markedly increased business, including both its producer receipts and sales in Delaware. These, it stated, were not indicative of increased or even continued levels of profit and were made possible by producers acceptance from Lewes of the lower blend price only during the pendency of this litigation. Lewes's evidence with regard to the profitableness of its business was totally lacking, and if it sought to prove the discrimatory effect of full regulation through diminishing profit, it had the burden

22. In addition to its purchases from producers, Lewes supplements its milk receipts with purchases from a Pennsylvania handler. These purchases of fluid milk which represented approximately one-fourth of Lewes's total milk purchases during the five year period, were made with minor exceptions, at prices substantially below the blend prices required by the Order. Milk purchased from another handler is not subject to the full regulation provisions to which Lewes objects and until August 1964 such purchases were not subject to any federal or state regulation. Since then, a compensatory payment has been required by the Order with regard to such purchases.

and not the Secretary. As to purchase arrangements with its suppliers, Lewes relied solely on the testimony of its treasurer. The Secretary declined to give the uncorroborated testimony offered by Lewes the credence with which the District Court vested it. In this respect the Secretary acted well within his province of weighing the evidence and the District Court was without power to overrule him absent clear evidence to the contrary. In the circumstances, the Secretary can hardly be faulted for concluding that:

> "[Lewes] has failed to sustain its burden of proof herein, that is, [Lewes] has failed to establish an unlawful 'trade barrier' by reason of the contested order and, in fact, has not even proved any competitive disadvantage by virtue thereof in connection with its operations in Delaware, as distinguished from its mere allegations of such disadvantage."

Reviewing the record of the administrative proceedings, it is clear that the Secretary's findings were supported by substantial evidence and that Lewes's trade barrier assertion remained a mere abstraction without evidentiary support. Although the District Court recognized the correct standard in reviewing the decision of the Secretary, it erred in the application of that standard. The role of the District Court is quite narrow; it must assure itself that the petitioning party has been accorded due process in the administrative proceedings. In so doing, the administrative record is reviewed to determine whether the decision rendered therefrom is supported by substantial evidence. The District Court is not free to draw its own independent inferences and conclusions from the record. Yet this is precisely what was done in the instant case. Lewes's challenge to the validity of the Order rests primarily on the

assertion that it is unable to meet competition from unregulated handlers in Delaware in the acquisition and sale of milk. The Secretary concluded that:

> "[Lewes] offered no evidence as to the prices paid or other costs incurred by its competitors, and there is accordingly no basis upon which we can compare costs or conclude that [Lewes's] costs are greater, as asserted by its witness."

The District Court rejected the Secretary's conclusion and arrived at an opposite result with the statement: "The record clearly shows that Lewes is put at a severe competitive disadvantage by the operation of the Secretary's order."[23] Its finding was based on what amounted to an abstract assertion by Lewes that the operation of the Order created an alleged economic trade barrier to its competitive position in the unregulated Delaware area. In overturning the Secretary's decision the District Court exceeded its function in a review proceeding. Contrary to the determination of the District Court, we find it clear that the findings and conclusions of the Secretary were adequately substantial and should not have been disturbed.

In fortification of the decision of the Secretary, some further observations are appropriate. In the Agricultural Marketing Agreement Act, Congress gave the Secretary broad discretionary powers to effectuate its purposes. It is his responsibility to determine which handling of milk shall be isolated for the purpose of regulation. Section 8c(5) of the Act specifies how the milk handling so selected is to be regulated.[24] Under section 8c(5)(A), only the milk

---

23. 260 F. Supp. at 926.

24. 7 U. S. C. § 608(c)(5) provides in pertinent part:

"(5) In the case of milk and its products, orders issued pursuant to this section, shall contain one or more of the follow-

received by regulated handlers is to be classified and only regulated handlers must pay producers delivering milk to them the prices specified in the order. It is clear that sections 8c(5)(A) and (B) authorize, in an order issued thereunder, the regulation of a handler's total milk supply from producers, that is, the minimum pricing of all milk received from producers.

The Secretary called as his expert witness, Mr. Herbert L. Forest, Director of the Dairy Division, Consumer and Marketing Service of the United States Department of Agriculture, for the purpose of discussing features of the Marketing Order concerning the conditions in the Chesapeake Bay area which made necessary full regulation of all producer milk received at a pool plant at the same class price according to utilization whether sold in the marketing area or outside the marketing area. In substance Mr. Forest testified that elements were taken into consideration in prescribing geographical boundaries of a marketing area,

---

ing terms and conditions, and (except as provided in subsection (7) of this section) no others:

"(A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay, and the time when payments shall be made, for milk purchased from producers or associations of producers. Such prices shall be uniform as to all handlers, subject only to adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers.

"(B) Providing:

"(i) for the payment to all producers and associations of producers delivering milk to the same handler of uniform prices for all milk delivered by them: . . .

"(ii) for the payment to all producers and associations of producers delivering milk to all handlers of uniform prices for all milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered: . . ."

the difficulties in arriving at them, and that inevitably some distributors would be found who sold their milk both inside and outside the area being established; that where a substantial amount of milk was sold by a handler in the marketing area—and generally ten percent or more of the fluid milk the handler received at its plant from farmers was regarded as substantial—the application of the pooling and pricing of a marketing order to all producer milk received at the handler's plant without regard to its ultimate disposition, was administratively necessary; that unless all of the milk received in such a plant was subject to full regulation the marketing order could be rendered ineffective because "open ends" would be left whereby the handler could pay a lower price for milk sold outside the market, reducing the average cost of the handler's total milk supply; that full regulation is intended to prevent a handler from disrupting the regulated market by undercutting its competitors in that market by reason of price advantages it enjoyed outside the market.

On cross-examination Mr. Forest was asked if Lewes operated two plants, one exclusively in the production of milk for sale in the marketing area, and the other plant for the production of milk it sells in the unregulated area, whether he agreed that the second plant would be unregulated and, as the Order is now written, Lewes would be in position to exploit the kind of profit shelter that had been described. He replied in the affirmative. The witness was then asked to consider an operation in one plant where five of ten farmers were designated as producing milk for the outside market and five for the inside market, and whether this would work a solution of the administrative problem to which he also replied in the affirmative. Pressed, on further cross-examination, Mr. Forest conceded the workability of other alternatives designed to relieve the handler of pay-

ing regulated prices on milk purchased for sale outside the regulated marketing area.

The District Court noted that since the Order was written on a plant basis rather than on a company basis it permits a multiple plant handler to devote only one of its plants for sales into the regulated market with regulation attached only to that plant. This it found underscored the unfairness of the Marketing Order in this case to Lewes since it operates only one plant with 100 percent of its production regulated, but if it segregated its sales it could escape regulation on milk sold in the unregulated area as in the instance of multiple plant handler.

The District Court found that Mr. Forest "agreed that an alternative system could be devised which would require the handler to pay each of its farmers the regulatory price on that percentage of the milk purchased that the handler in turn actually introduced into the marketing area, and permit the handler to pay the local competitive price on the balance of its purchases from each farmer."[25] and that "at least two other administrative techniques were available to assure proper payment of the minimum blend price on that portion of a partially regulated handler's purchases introduced into the marketing area."[26] The District Court concluded that "Either of these alternative techniques used in connection with partial regulation of Lewes, would obviate the need for the unfairness caused by full regulation."[27] Hence it found no valid policy for full regulation of Lewes under the Order and insofar as Lewes was concerned the Order was unnecessary, unfair and arbitrary.

The District Court justified its conclusions by a too literal reading of Mr. Forest's answers interspersed in his

25. 260 F. Supp. at 928.
26. *Id.*
27. *Id.*

lengthy cross-examination. It predicated its reasoning that the Marketing Order was unfair to Lewes on the theory that a handler with two plants could render itself exempt from full regulation by selling all the milk it received at one plant in the market area and selling all the production of the other outside the market, while Lewes with a single plant could not so operate. No showing was made that any handler with more than one plant was thereby escaping full regulation and Mr. Forest made it clear that should such circumstances arise they would promptly induce appropriate regulatory measures. The alternative provisions for regulation found to be available to the Secretary was based on answers given by Mr. Forest which were induced by questions suggesting factors afield from the realities and practicalities of the actual conditions sought to be regulated by the Marketing Order. A review of Mr. Forest's entire testimony leads to the conclusion that the admissions noted by the District Court were counterbalanced by his reiterated statements that past experience had taught that the provision for full regulation was required for effective administration.

If there are alternatives to the Order as framed we are persuaded, as argued on behalf of the Secretary, that the wisdom of his choice of the alternatives is not cognizable in this proceeding. Only the legality of his choice is in issue here. The fact that regulation may be achieved that is equally as efficacious for the purpose of the Act with less expense to Lewes does not render illegal the application of the Order to Lewes.

Other challenges to the validity of this Order prompted the Court of Appeals for the Fourth Circuit to say:

> "After all, the Secretary must look at the area with a wide and comprehensive perspective. He has

> before him the entire output of milk in the area, and he must search for the best ways and means for its disposition. Aware of the annual consumption and distribution of fluid milk, he must arrange to channel the residue into outlets the most advantageous to the producer and consumer. He fashions his order accordingly. Of course, there may be some resultant damage to a handler or producer in the enforcement of the Act but this lack of perfection does not destroy the validity of the Order. The constitutionality of the Act is no longer questionable. . . . Absolute equality is not demanded to sustain the operation of the Order. If the Secretary cannot 'produce complete equality, for the variables are to numerous', he 'fulfills his role when he makes a reasoned' Order. . . ."[28]

The foregoing statement is equally cogent in this case.

With a view toward these problems, the Secretary, consistent with the declared policy of the Congress,[29] deemed it essential to the stable and orderly function of the market that handlers operating pool plants which have substantial connections with the market should be fully regulated. Full regulation is neither a new nor an unusual regulatory technique. Similar requirements have been imposed by the Secretary as necessary to insure orderly marketing conditions for more than twenty-five years and now obtain in sixty-five other federal milk marketing orders across the nation. Long-lived and widespread usage alone, of course, does not insulate a system from meritorious attack. On the other hand in the administration of so complex an Act by specialists and experts the long standing con-

---

28. *United States v. Mills*, 315 F. 2d 828, 838.

29. 7 U. S. C. § 602.

struction of the statute by the Secretary is entitled to considerable weight at the hands of the courts.[30]

The foregoing discussion leads to the conclusion that Lewes has fundamentally failed to prove that its competition in the unregulated market enjoyed an advantage over it which creates an economic trade barrier contemplated by section 8c(5)(G)[31] as treated by the Supreme Court in *Lehigh Valley Cooperative Farmers, Inc. v. United States*,[32] and we find valid the action of the Secretary in imposing full regulation upon Lewes under Marketing Order No. 46. Hence the judgment of the United States District Court for the District of Delaware of December 12, 1966 will be reversed.

---

30. *Ideal Farms, Inc. v. Benson*, 288 F. 2d 608, 615 (3 Cir. 1961), *cert. den.*, 372 U. S. 965 (1963); *Queensboro Farm Products v. Wickard*, 137 F. 2d 969, 980-981 (2 Cir. 1943).

31. 7 U. S. C. § 608c(5)(G).

32. 370 U. S. 76 (1962).

JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the District of Delaware and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed December 12, 1966, be, and the same is hereby reversed.

ATTEST:

THOMAS F. QUINN,
Clerk.

September 25, 1968.

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

CIVIL ACTION NO. 2353

LEWES DAIRY, INC., AND CLIFFORD S. OTT AND JAMES M. FAULKNER, AS INDIVIDUALS AND D/B/A HOLLYBROOK DAIRY, A PARTNERSHIP,

Plaintiffs,

v.

CLIFFORD M. HARDIN,

Defendant.

MEMORANDUM OPINION

Wilmington, Del.
Dated Feb. 5, 1970.

LAYTON, *J.*

This is a motion by Lewes Dairy and Hollybrook Dairy, plaintiffs in the above case, for a further remand in order to permit them to go before the Secretary of Agriculture for the second time to develop additional evidence in a matter which has twice been before the Circuit Court of Appeals and once before the Supreme Court of the United States, resulting adversely to these Dairies.

The history of this litigation is drawn out. In 1963, I granted summary judgment in favor of Lewes and Hollybrook on the ground that a milk marketing order was invalid as to plaintiffs because in violation of § 5(G) of the

Act. This result was based upon my conclusion that a milk order compelling a Delaware non-regulated dairy to pay contributions into a Maryland pool fund, based not only upon the milk it delivered into Maryland but also upon the milk it produced and delivered in Delaware, of itself constituted a trade barrier.

The Circuit Court in 337 F. 2d 827 (3d Cir. 1964) vacated my order and directed that the matter be remanded to the Secretary of Agriculture in order that testimony be taken further to develop the trade barrier question.* The Court made no reference to the type of evidence it felt to be relevant to this issue.

The plaintiffs having developed the type of record they thought was relevant to the trade barrier question, the action was reinstituted, cross motions for summary judgment again filed, and again I granted judgment in favor of Lewes and Hollybrook on the trade barrier theory. Again, the Circuit Court reversed, 401 F. 2d 308 (3d Cir. 1968), stating, inter alia:

> "* * * that Lewes has fundamentally failed to prove that its competition in the unregulated market enjoyed an advantage over it which creates an economic trade barrier * * *." 401 F. 2d at 320.

The Supreme Court denied certiorari,** a mandate came down and Lewes and Hollybrook filed timely motions for a further remand to the Secretary of Agriculture in order to develop new testimony.

The Government opposes any further remand.

---

* [This case] "is not to be decided upon a record without evidence to sustain the factual realities of the legal arguments directed toward the issues brought into focus by the subsequent decision of importance (Lehigh Valley), upon which the Secretary has not had an opportunity to exercise his statutory powers and expertise." 337 F. 2d at 832.

** 394 U. S. 929 (1969).

Pertinent excerpts from the latest opinion of the Court of Appeals show:

"* * * Although the witness asserted that the prices paid by competitors were lower than those which the Order forced Lewes to pay, he failed to testify as to prices paid by other milk companies and no other evidence was offered by Lewes on this crucial point. In this situation, it cannot be said that the proof offered by Lewes demonstrated the specific discriminatory effect of the challenged regulation as was disclosed in *Lehigh Valley*." 401 F. 2d at 314.

* * *

"* * * Applying these standards to the present appeal, it was incumbent on Lewes to demonstrate at the administrative hearing the existence of the alleged trade barriers by showing that it paid more for its milk than its unregulated Delaware competitors. Unless these competitors do in fact enjoy a price advantage, it cannot be said that Lewes suffers an economic burden caused by the Order. The only evidence Lewes offered on the point was the testimony of its treasurer which has been heretofore recounted. It fell far short of the required specific showing." 401 F. 2d at 316.

* * *

"* * * The secretary concluded that:

'[Lewes] offered no evidence as to the prices paid or other costs incurred by its competitors, and there is accordingly no basis upon which we can compare costs or conclude that [Lewes's] costs are greater, as asserted by its witness.'" 401 F. 2d at 317.

The basis of plaintiffs' motion is that they thought they had developed before the Secretary at the administrative

hearing the type of record governing the trade barrier issue but find for the first time in the language above quoted that they had failed to grasp the nature of the evidence which the Circuit Court felt was required to sustain their position. They frankly concede that they could have put in further relevant evidence, failed to do so and ask to be excused from the effects of their oversight.

The case has gone on for a long time and doubt exists whether the discretion of a Court should be exercised in favor of this motion.

Conceding that plaintiffs' counsel had the opportunity, following the Circuit Court's first opinion, to make its full record before the Secretary, three considerations may be borne in mind:

(1) The scheme underlying the Act and the Act itself are quite complex.

(2) It was not until the recent opinion of this Circuit in 401 F. 2d 308 that any Court had taken occasion to comment upon the type of evidence it felt was relevant to the precise issue here.

(3) Even very able counsel, such as here involved, are occasionally guilty of oversight.

Two cases, particularly the latter, indicate that a wide liberality should be extended in cases of this sort in order that essential justice be done.

In DuPont v. United States, 385 F. 2d 780 (3d Cir. 1967), a tax suit involving a casualty loss, the Court reversed the trial Court's denial of plaintiff's motion to open the judgment and receive further evidence on values. It is clear that plaintiffs' counsel overlooked adducing the proper type of evidence on the question of value of the property after the loss. Nevertheless, the Circuit Court directed that a new trial be granted. In its reversing opinion, the Circuit

observed that, "It is always desirable that a litigant's claim should be determined after the presentation of all the relevant evidence.", and again, "The cause of justice will be advanced with no prejudice to the government * * *." 385 F. 2d at 784.

In Deakyne v. Commissioners of Lewes, 416 F. 2d 291 (3d Cir. 1969), the Circuit Court again reversed a trial Court's refusal to grant a new trial. On three occasions, one during pretrial and twice during the trial itself, the Court called attention to counsel for the Town to the probable importance of asserting a further defense based upon a state statute. On each occasion, counsel refused the suggestion to amend. Just before the Court's charge to the jury, counsel for the Town finally moved to amend but the motion was denied. There was a verdict for plaintiff and a motion for new trial upon the grounds of the Court's refusal to grant the amendment. The motion was denied.

In reversing, the Circuit Court stated:

> "We believe that under the liberal policy which characterizes the allowances of amendments under F.R.C.P. 15(b), the district court should have granted leave to amend * * *."

And, again:

> "Appellee is prejudiced, of course, in that she gained a verdict which is now being reversed. But this is not the kind of prejudice contemplated by Rule 15(b)."**

Of course, neither of the two cases just cited is precisely on the point, but their general reasoning reveals the

---

** 416 F. 2d at 300.

* 416 F. 2d at 298.

wide liberality with which a reviewing Court views applications of this sort.

At the outset, Lewes is faced with the element of time. Six years have elapsed and, if this motion is granted, a further substantial period must elapse until the record before the Secretary can be supplemented, a new motion for summary judgment filed and decided, and an appeal had. Superficially, there is merit to the Government's contention that Lewes has already had one opportunity to develop its record before the Secretary and that at some point, there should be an end to litigation.

On the other hand, I have considerable sympathy with the position in which Lewes finds itself. At the time, it was attempting to develop evidence in support of its trade barrier contention, no district or circuit court, of which I am aware, had ever had occasion to discuss this precise problem. The Supreme Court of the United States had specifically avoided it. Lehigh Valley Coop. v. United States, 370 U. S. 76, 99. And the Third Circuit Court in remanding the matter back to the Secretary in 1964, quite naturally did not feel obliged to tell Lewes what sort of record it should make.

Thus, it was not until the Circuit Court's second opinion in September * of 1968 (rehearing denied November 19, 1968) from which excerpts were quoted above, that Lewes was in a position to realize the views entertained by that Court on this question. And while it may be conceded that counsel might have anticipated these views, the fact remains that they are very able counsel, admit their oversight and represent that there is further evidence relevant to this issue which can be presented.

Secondly, the penalty for the oversight here does not fall upon counsel but upon the two individual partners com-

* Certiorari was not denied until March 24, 1969.

prising Lewes who are innocent of any blame. Over the past five years, a very large amount of money has been accumulated by Lewes in escrow awaiting the outcome, and the denial of this motion would cost it several hundred thousand dollars without the merits of the case ever having been fully presented and considered.

Thirdly, while the *DuPont* and *Deakyne* cases above cited, dealing as they do with a motion to amend and a motion to open judgment to take further evidence, do not bear directly on the subject of this motion, and in neither was a substantial period of time involved, nevertheless, they indicate that appellate courts do not favor the disposition of litigation where all the issues and relevant evidence have not been fully presented and considered.

Finally, the granting of this motion would result in no appreciable prejudice to the United States. Conceding that a considerable delay would again ensue, it would not interfere with the overall effectiveness of the Milk Marketing Order. The moneys involved are being accrued in escrow and will not be lost to the numerous Maryland dairy farmers comprising the milk marketing area in question. And if ultimately ordered to be paid into the Maryland pool, it will, in my view, be a complete and undeserved windfall representing, as it does, levies exacted upon large quantities of milk delivered by Lewes, not into the Maryland marketing area, but into Delaware, an area not ever the subject of the Marketing Order in question.*

---

* This represents one of those curious and, possibly, unavoidable inequities arising from the operation of a plan of this sort, which although beneficial as a whole, nevertheless, results in a decided unfairness to a few. "* * * *Of course, there may be some resultant damage to a* * * * *producer* in the enforcement of the Act but this lack of perfection does not destroy the validity of the Order * * *." (Emphasis supplied.) United States v. Mills, 315 F. 2d 829, 838 (4 Cir. 1963).

For the foregoing reasons, and despite the long, drawn-out nature of this proceeding, I conclude that essential justice would be better served by granting this motion.

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

CIVIL ACTION NO. 2353

LEWES DAIRY, INC., AND CLIFFORD S. OTT AND JAMES M. FAULKNER, AS INDIVIDUALS AND D/B/A HOLLYBROOK DAIRY, A PARTNERSHIP,

Plaintiffs,

v.

CLIFFORD M. HARDIN,

Defendant.

ORDER.

THIS 3rd day of March, 1970, plaintiffs having moved the Court for the entry of an order remanding this cause to the Secretary of Agriculture for the submission of further evidence in the light of the opinion herein of the United States Court of Appeals for the Third Circuit dated September 25, 1968, and the Court having received the memoranda of the parties and heard oral argument on plaintiffs' motion and having issued its memorandum opinion dated February 5, 1970, in which the Court, in the exercise of its discretion, decided to grant such motion—

IT IS HEREBY ORDERED:

That the order of this Court dated December 12, 1966, from which the appeal was taken by defendant that cul-

minated in the opinion of the Court of Appeals dated September 25, 1968, is vacated;

That this cause is remanded to the Secretary of Agriculture for the submission of further evidence by plaintiffs of the kind called for by the opinion herein of the Court of Appeals, dated September 25, 1968, and for appropriate administrative proceedings in the light thereof with respect to the substantive point which plaintiffs assert concerning the unlawful "trade barrier" effect of Federal Milk Marketing Order No. 127 (now No. 16, promulgated to regulate the marketing of milk in the State of Maryland); and,

That this Court retains jurisdiction in the premises for such further and appropriate review proceedings by it as a party may by motion seek.

/s/ CALEB R. LAYTON, III

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 18858

LEWES DAIRY, INC., AND CLIFFORD S. OTT AND JAMES M. FAULKNER, AS INDIVIDUALS AND D/B/A HOLLYBROOK DAIRY, A PARTNERSHIP,
Plaintiffs-Respondents,

v.

CLIFFORD M. HARDIN,
Defendant-Petitioner.

HONORABLE CALEB R. LAYTON, 3D, UNITED STATES DISTRICT JUDGE FOR THE DISTRICT OF DELAWARE,
Nominal Respondent.

PETITION FOR A WRIT OF MANDAMUS.

ISSUE PRESENTED.

Whether, in the circumstances of the case, the district court's March 3, 1970, order remanding the matter for further administrative proceedings violated the mandate of this Court in *Lewes Dairy, Inc., et al. v. Freeman*, No. 16528 (401 F. 2d 308 certiorari denied, 394 U. S. 929).

PETITION.

Petitioner Clifford M. Hardin, Secretary of Agriculture, respectfully requests that a writ of mandamus issue requiring the Respondent, Hon. Caleb R. Layton, 3d, United States District Judge for the District of Delaware, (1) to enter judgment for Petitioner in *Lewes Dairy, Inc., et al. v. Hardin*, Civil Action No. 2353, D. Del., in accordance with the clear import of this Court's mandate in *Lewes Dairy, Inc., et al. v. Freeman*, No. 16528; and (2) to release to the Market Administrator the monies which have been escrowed under orders of the district court in two companion cases; (*United States v. Clifford S. Ott, et al.*, Civil Action No. 2190, D. Del., and *United States v. Lewes Dairy, Inc.*, Civil Action No. 2191, D. Del.), pending the termination of litigation in *Lewes Dairy, Inc., et al. v. Freeman*.

Copies of Respondent's remand order and of other relevant documents filed in the district court and in this Court are attached to this Petition.

JURISDICTION.

The jurisdiction of this Court to grant the requested writ of mandamus is invoked under the All Writs Act, 28 U. S. C. 1651. The question raised by this petition is whether, when it remanded the case to the Secretary for further administrative action (App. 35a),[1] the district court acted in derogation of the mandate of this Court in *Lewes Dairy, Inc., et al. v. Freeman*, No. 16528. It is well-settled that where, as here, the issue is whether the district court complied with a mandate of a court of appeals, "a petition for a writ of mandamus is an appropriate method of raising the issue * * *." *United States v. Smith, District Judge*, 156 F. 2d 642, 644 (C. A. 3), reversed on other grounds, 331

1. "App." refers to an appendix to this petition, *supra* at 1a-36a.

U. S. 469. See also, to the same effect, *United States v. United States District Court for the Southern District of New York*, 334 U. S. 258; *Delaware, Lackawanna and Western Railroad Co. v. Rellstab*, 276 U. S. 1; *In Re Potts*, 166 U. S. 263; 6 Moore's Federal Practice Digest 54.10[4]. In holding that mandamus is the appropriate remedy in these circumstances, the Supreme Court has explained:

> It is, indeed, a high function of mandamus to keep a lower tribunal from interposing unauthorized obstructions to enforcement of a judgment of a higher court. * * * That function may be as important in protecting a past exercise of jurisdiction as in safeguarding a present or future one. *United States v. United States District Court for the Southern District of New York*, *supra* at 264.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 18858

LEWES DAIRY, INC., AND CLIFFORD S. OTT AND JAMES M. FAULKNER, AS INDIVIDUALS AND D/B/A HOLLYBROOK DAIRY, A PARTNERSHIP,

Respondents

v.

CLIFFORD M. HARDIN,

Petitioner

HONORABLE CALEB R. LAYTON, 3D, UNITED STATES DISTRICT JUDGE FOR THE DISTRICT OF DELAWARE,

Nominal Respondent

Present: KALODNER, STALEY and FORMAN, *Circuit Judges.*

ORDER.

Upon consideration of petitioner's application for writ of mandamus in the above-entitled case,

It is ORDERED that respondents, and nominal respondent if he so wishes, file and serve an answer to the petition for writ of mandamus, not later than May 28, 1970; and

It is Further ORDERED that legible typewritten briefs be filed and served by petitioner and respondents and by

nominal respondent, if he so wishes, not later than June 2, 1970; and

It is Further Ordered that petitioner, respondents and nominal respondent, if they or any of them so wish, may file and serve legible typewritten reply briefs not later than June 9, 1970; and

It is Further Ordered that the Clerk of this Court list this case for argument on the merits during the week of June 15, 1970, before the panel which decided our case No. 16528.

By THE COURT,

Kalodner, *Circuit Judge*.

Dated: May 20, 1970

IN THE

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 18858

LEWES DAIRY, INC., AND CLIFFORD S. OTT AND JAMES M. FAULKNER, AS INDIVIDUALS AND D/B/A HOLLYBROOK DAIRY, A PARTNERSHIP,

Plaintiffs-Respondents,

v.

CLIFFORD M. HARDIN,

Defendant-Petitioner,

HONORABLE CALEB R. LAYTON, 3D, UNITED STATES DISTRICT JUDGE FOR THE DISTRICT OF DELAWARE,

Nominal Respondent.

ANSWER TO PETITION FOR MANDAMUS

Pursuant to the Court's order of May 20, 1970, respondents Hollybrook Dairy and Lewes Dairy, Inc., make the following answer to the petition:

1. A writ of mandamus should issue herein only if the mandate of this Court entered in appeal No. 16528 imposed upon the District Judge a clear legal duty and denied him the power thereafter to consider an application for an order such as he entered on March 3, 1970, providing for a remand of the case to the Secretary of Agriculture for the submis-

sion of further evidence by the respondent dairies of the kind held proper by the opinion of this Court dated September 25, 1968.

2. The mandate of this Court did not expressly deny the District Judge the power to remand for the taking of the right kind of evidence; it simply reversed his judgment in favor of the respondent dairies and ruled, as the basis for such reversal, that the dairies had failed in their proof because the generalized evidence which they had submitted as to their competitive situation in buying milk was insufficient, since direct evidence of the specific costs to them and their competitors was required.

3. Furthermore, there was no basis in the circumstances of the case for reading into the mandate an implication that it denied the District Judge the power to consider such a remand. The circumstances were:

(a) In the absence of a power to consider remand, this case would have been disposed of without there ever having been a determination of the merits of the substantive "trade barrier" legal question which remained at the heart of the controversy.

(b) This unanswered substantive question had been conceded by the Secretary to involve "great public interest," and the dairies had struggled many years to have their large personal stakes in this controversy turn on a determination of the merits of that question.

(c) The dairies' failure in the form of their proof was not something for which they ought to be made to suffer for having failed to foresee, because the standard of proof appropriate to proceedings of this kind had never been delineated by any court prior to this Court's last opinion; and if, nevertheless, the right form of proof should have been foreseen, the failure to foresee

it was a failure on the part of counsel, for whose failures this Court, in the interest of justice, is reluctant to cause the client to suffer if the shortcoming is of a reasonably excusable character.

(d) In the absence of a remand, the dairies would not only have lost the substantial amounts of money they had on deposit in the registry of the Court without regard to the merits of their position, but—

(i) In the case of Lewes, it would have lost monies on deposit which were generated during and relate to time periods as to which there had not only been no evidence at all as to prices, but there had never even been a due process opportunity to submit any evidence; such a period is that which has ensued since the last opinion of this Court.

(ii) In the case of Hollybrook, individual levies would have been required against the former partners of that firm, since—as the record in the District Court in Civil Action No. 2190 largely shows, and as those partners are prepared to prove—Hollybrook went broke under the regulation here involved, as opposed to experiencing the business growth which the Court in its last opinion, at p. 316 of 401 F. 2d, regarded as noteworthy in Lewes' case.

(e) The Secretary had not hesitated, in the first round of appeals involving this controversy, No. 14643 in this Court, to urge (with success) that the case be remanded to him for further proceedings in the light of the decision in *Lehigh Valley Cooperative Farmers, Inc. v. United States*, 370 U. S. 76 (1962), which had issued after the initial administrative proceedings, and the remand here complained of in effect provided noth-

ing more than a similar opportunity for respondents, so that the proceedings could conform to and apply the holdings in this Court's opinion of September 25, 1968.

(f) The Secretary offered the District Judge no reason based on practical considerations why a further remand would be harmful (interest was and is accumulating on the money on deposit), except that it would entail further time and effort in what had already been long-pending litigation (a frequent necessary concomitant of the judicial process' work in frontier areas such as this); in fact, not only had the Secretary recognized that there were considerations other than time involved when he wanted a remand, but he had shown no sense of urgency at all when at many stages throughout this litigation he had felt free to take very long periods of time to suit his convenience.

4. In the proceedings before the District Judge which culminated in his order of March 3, 1970, the Secretary of Agriculture argued *res judicata* but never even suggested to the Judge that the entry of such an order would constitute an actual violation of this Court's mandate, as is now contended, and the Secretary's failure to make the point below should alone be fatal to his petition.

MORRIS, NICHOLS, ARSHT & TUNNELL,
JAMES M. TUNNELL, JR.,
James M. Tunnell, Jr.,
ANDREW B. KIRKPATRICK, JR.,
Andrew B. Kirkpatrick, Jr.,
3000 duPont Building,
Wilmington, Delaware,
Attorneys for Plaintiffs-Respondents.

May 28, 1970

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 18858

LEWES DAIRY, INC., AND CLIFFORD S. OTT AND JAMES M. FAULKNER, AS INDIVIDUALS AND D/B/A HOLLYBROOK DAIRY, A PARTNERSHIP,
Respondents,

v.

CLIFFORD M. HARDIN,
Petitioner,

HONORABLE CALEB R. LAYTON, 3D, UNITED STATES DISTRICT JUDGE FOR THE DISTRICT OF DELAWARE,
Nominal Respondent.

ORDER

Present: KALODNER, STALEY and FORMAN, *Circuit Judges.*

Honorable Clifford M. Hardin, Secretary of Agriculture of the United States having filed a petition for the issuance of a writ of mandamus requiring Honorable Caleb R. Layton, III, Judge of the United States District Court for the District of Delaware (1) to enter judgment for him in accordance with the mandate of this court in Lewes Dairy, Inc., et. al. v. Freeman (former Secretary of Agriculture), dated September 25, 1968 and (2) to release to the Market Administrator of the Upper Chesapeake Bay, Maryland Marketing Area the monies which have been deposited in

the registry of the United States District Court for the District of Delaware in escrow in the case of United States v. Clifford S. Ott and James M. Faulkner as individuals and d/b/a Hollybrook Dairy, a partnership, Civil Action No. 2190, D. Del., and in the case of United States v. Lewes Dairy, Inc., Civil Action No. 2191, D. Del.; and

Lewes Dairy, Inc. and Clifford S. Ott and James M. Faulkner as individuals and d/b/a Hollybrook Dairy, a partnership, having answered and filed briefs on behalf of the nominal respondent named in said petition for mandamus pursuant to an order fixing June 18, 1970 as the day for oral argument on said petition; and

A brief amicus curiae having been filed by Maryland Cooperative Milk Producers, Inc. in support of the petition; and

This cause coming on to be heard on the petition and answer and respective briefs and the court having considered them and having heard the oral arguments of the parties; and

It appearing to the court that the order of March 3, 1970 by Judge Layton, remanding this cause to the Secretary of Agriculture for submission of further evidence, is inconsistent with the opinion of this court in Lewes Dairy, Inc., et al. v. Freeman, 401 F. 2d 308 (1968), and the terms of the mandate based thereon dated September 25, 1968, and was beyond the Judge's province because the opinion of this court in Lewes Dairy, Inc. v. Freeman, reads:

> "In overturning the Secretary's decision the District Court exceeded its function in a review proceeding. Contrary to the determination of the District Court, we find it clear that the findings and conclusions of the Secretary were adequately substantiated and should not have been disturbed." 401 F. 2d at 317.

* * *

"and we find valid the action of the Secretary in imposing full regulation upon Lewes under Marketing Order No. 16. Hence the judgment of the United States District Court for the District of Delaware of December 12, 1966 will be reversed." 401 F. 2d at 320.

Patently this was a final decision of this court upon which a petition for rehearing before the court en banc, 401 F. 2d 308 (Nov. 19, 1968) and a petition for certiorari, 394 U. S. 929 (1968) were denied and notwithstanding arguments advanced on behalf of Lewes Dairy, Inc., the United States District Court for the District of Delaware was without authority other than to follow the direction of the mandate as based on the opinion; therefore it is

ORDERED that the prayer of the petition of Honorable Clifford M. Hardin, Secretary of Agriculture of the United States for issuance of a writ of mandamus directing the United States District Court for the District of Delaware (1) to enter judgment for him in accordance with the mandate of this court of September 25, 1968 and the opinion on which it is based and (2) to order the release to the Market Administrator, Upper Chesapeake Bay, Maryland Marketing Area of the monies on deposit in escrow in the registry of the said District Court in the cases of United States v. Clifford S. Ott, et al., Civil Action No. 2190, and United States v. Lewes Dairy, Inc., Civil Action No. 2191, is hereby granted; and it is

FURTHER ORDERED that the District Court do all things appropriate to the proper implementation of the mandate and the opinion on which it is based; and it is

FURTHER ORDERED that the order of the United States District Court for the District of Delaware of March 3, 1970 in the case of Lewes Dairy, Inc. and Clifford S. Ott and

James M. Faulkner as individuals and d/b/a Hollybrook Dairy, a partnership, Civil Action No. 2353, D. Del., is hereby vacated; and it is

FURTHER ORDERED that the actual issuance of the writ of mandamus ordered herein shall be suspended by the Clerk of this court since this court is confident that when Honorable Caleb R. Layton, III, Judge of the United States District Court for the District of Delaware, is informed of the issuance of this order he will comply therewith without further formality.

By THE COURT.

PHILIP FORMAN,
Circuit Judge.

Dated: July 1, 1970.

LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
OCT 8 1970
E. ROBERT SEAVER, CLERK

No. 853

In the Supreme Court of the United States

OCTOBER TERM, 1970

LEWES DAIRY, INC., ET AL., PETITIONERS

v.

CLIFFORD M. HARDIN, SECRETARY OF AGRICULTURE

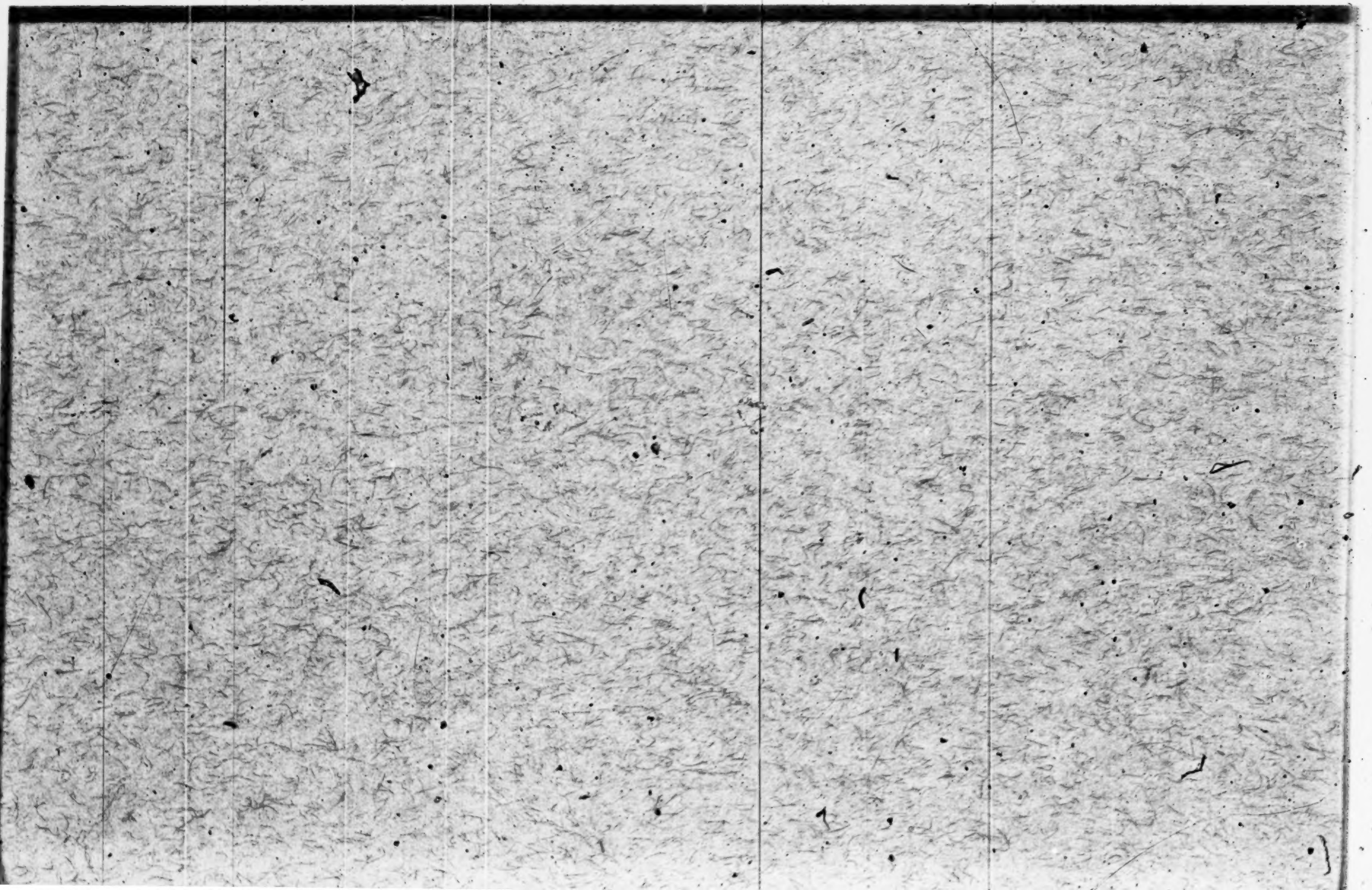
ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,

WILLIAM D. RUCKELSHAUS,
Assistant Attorney General,

ALAN S. ROSENTHAL,
JUDITH S. SEPLOWITZ,
Attorneys,
Department of Justice,
Washington, D. C. 20530.



In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 653

LEWES DAIRY, INC., ET AL., PETITIONERS

v.

CLIFFORD M. HARDIN, SECRETARY OF AGRICULTURE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinions of the court of appeals (Pet. App. 44-47) and the district court (Pet. App. 25-32) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 1, 1970, and a petition for rehearing was denied on July 27, 1970. The petition for a writ of certiorari was filed on September 4, 1970. The juris-

diction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals correctly concluded that its mandate in *Lewes Dairy, Inc., et al.* v. *Freeman*, 401 F.2d 308 (Pet. App. 1-23) certiorari denied, 394 U.S. 929, constituted a "final decision" which precluded the district court from remanding the case to the Secretary of Agriculture for further administrative proceedings.

STATEMENT

Petitioner Lewes Dairy [1] is a milk handler located in Lewes, Delaware, an area not regulated by a milk marketing order. On February 1, 1960, the predecessor to Milk Marketing Order No. 16 (7 CFR Part 1016) took effect. Lewes became a fully regulated handler by virtue of its substantial sales of fluid milk in the Upper Chesapeake Bay Marketing Area, the area covered by the Order (Pet. App. 2, n.1). Lewes filed an administrative petition under 7 U.S.C. 608c(15)(A) objecting to full regulation under the Order (Pet. App. 2, n.3).[2]

---

[1] Hollybrook Dairy, a defunct partnership, was also a plaintiff in this action. Its interests have been represented by Lewes since it went out of business prior to 1964 (Pet. App. 2, n. 2). Petitioners will be referred to collectively as Lewes.

[2] The history of this lengthy litigation is set out in more detail in two earlier opinions of the court of appeals, *United States* v. *Lewes Dairy, Inc.*, 337 F. 2d 827, and *Lewes Dairy, Inc., et al.* v. *Freeman*, *supra*.

After an administrative determination that the marketing order provisions were valid, Lewes filed an action for review in the district court pursuant to 7 U.S.C. 608c(15)(B). That court held that full regulation of Lewes' milk on the basis of its Maryland sales constituted a "trade barrier," prohibited by 7 U.S.C. 608c(5)(G) as construed in *Lehigh Valley Cooperative Farmers, Inc.* v. *United States*, 370 U.S. 76 (Pet. App. 3). Since *Lehigh Valley* was decided after the conclusion of these administrative proceedings and the "trade barrier" argument had not been made at that level, the court of appeals, at the Secretary's suggestion, reversed and remanded the case to the Department of Agriculture for a factual determination on the "trade barrier" issue (*ibid.*). Lewes' petition for a writ of certiorari was denied. 379 U.S. 1000.

Before the Secretary on remand, Lewes called only one witness and produced no cost data to buttress its assertion that, as a result of full regulation under the Order, it was being required to pay more for its milk than the unregulated Delaware handlers with which it competed (Pet. App. 11). The Judicial Officer (acting for the Secretary), again upheld the challenged Order as applied to Lewes (Pet. App. 3). The district court reversed, this time on the ground that the Secretary's decision was not supported by substantial evidence. *Lewes Dairy, Inc.* v. *Freeman*, 260 F. Supp. 921 (D. Del.).

The Secretary appealed, asserting that his decision that Lewes had failed to establish the factual predicate to its trade barrier argument was correct. In re-

sponse, Lewes contended, *inter alia*, that it had been misled at the administrative hearing into believing that the kind of evidence it had submitted was sufficient to establish a *prima facie* case of competitive disadvantage.

The court of appeals reversed, noting that "[i]t was for the very purpose of affording Lewes an opportunity to adduce evidence to demonstrate the trade barrier effect of the Marketing Order that this court remanded the matter for further administrative procedure" (Pet. App. 11). It held "valid the action of the Secretary in imposing full regulation upon Lewes under" the challenged Order (Pet. App. 23). Lewes then filed a petition for rehearing in which it renewed its claim that it had been misled at the administrative level and asserted that the court of appeals, by requiring evidence that Lewes paid more for its milk than its unregulated Delaware competitors, had unfairly imposed an evidentiary burden which it had had no reason to anticipate at the time of the administrative proceedings.

After the petition for rehearing was denied, Lewes filed a petition for certiorari in which it again claimed that it had been treated unfairly. This Court denied certiorari. 394 U.S. 929. Although the court of appeals had reversed without remanding for further proceedings (Pet. App. 23), Lewes then filed a motion in the district court in which it requested that court to remand the case to the Secretary to enable it to furnish evidence of the kind which the court of appeals had held it should have submitted in the second administrative proceeding (Pet. App. 25). In requesting this relief, Lewes relied upon essentially the same

contentions which it had unsuccessfully urged both in the court of appeals and in this Court on its petition for certiorari. The district court granted the motion to remand on the ground that "essential justice would be better served" thereby (Pet. App. 32).

The Secretary filed a petition for a writ of mandamus in the court of appeals, asserting that the district court's remand order was contrary to the court of appeals' mandate (Pet. App. 35). The petition came before the same panel that had rendered the earlier court of appeals decision (Pet. App. 1, 44). The court granted the petition, stating that the district court's remand order was "inconsistent with the opinion of this court in *Lewes Dairy, Inc., et al.* v. *Freeman*, 401 F.2d 308 (1968), and the terms of the mandate based thereon * * * and was beyond the Judge's province * * *" (Pet. App. 45). The court of appeals ordered the district court to enter judgment for the Secretary and to release over $400,000 in escrowed monies which had accumulated during the almost ten years this litigation has been in progress (Pet. App. 46). These monies, which Lewes had been obligated to pay under the challenged marketing order, were held in escrow pending final resolution of the validity of the original action of the Secretary seeking to enforce the Order against Lewes.[3] Lewes' petition for a rehearing *en banc* was denied.

---

[3] The pendency of a Section 608c(15) proceeding does not relieve the handler of the obligation of complying with the marketing order provisions unless and until those provisions are declared invalid. 7 U.S.C. 608c(15)(B).

ARGUMENT

There was but one question before the court of appeals when it granted the Secretary's mandamus petition—whether the court's mandate in *Lewes Dairy, Inc., et al.* v. *Freeman*, 401 F.2d 308, was a "final decision" concluding this protracted litigation. The answer, given by the same panel of the court that had rendered the earlier decision, was that it was.

The question whether a court of appeals has correctly construed its own mandate is inappropriate for review before this Court. But Lewes does not seriously contend that the court of appeals construed its mandate incorrectly, or that this Court should decide that issue. Its real quarrel is with the mandate itself. Its remedy, however, for any error by the court of appeals in reversing the district court's second order without remanding for further administrative proceedings, was by petition for rehearing in the court of appeals and, if that was denied, by petition for certiorari in this Court. Lewes filed such petitions, arguing essentially as it does now, that the court of appeals' requirement of specific evidence "would constitute a retroactive change in the ground rules upon which the administrative hearing itself proceeded." (Pet. 17, n.13 in No. 924, O.T. 1968). When the petition for certiorari was denied, the issue was closed; it cannot be resurrected now.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

WILLIAM D. RUCKELSHAUS,
Assistant Attorney General.

ALAN S. ROSENTHAL,
JUDITH S. SEPLOWITZ,
Attorneys.

OCTOBER 1970.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1970 405690 219.